

bearing this mark. In addition, applicant has referred in its brief to eight registrations issued to third persons on the Principal Register, the Supplemental Register, or under the Act of 1920 for marks such as "EASY-KLEEN", "EASY CLEEN", "EASI-CLEEN", "E-Z KLEEN", and the like for various products.

[1] The fact that a designation or notation consisting of two or more words of the English language may not, in its precise combination, be found in the dictionary and/or that a designation has been prominently displayed on or in association with a particular product does not, in and of itself, establish that such a notation is capable of distinguishing this product. See: *Flexitized, Inc., et al. v. National Flexitized Corporation et al.*, 142 USPQ 334 (CA 2, 1964). Likewise, an intention that a term be recognized as a trademark and an extensive advertising campaign featuring this term does not, ipso facto, establish the capability thereof to distinguish an applicant's goods. See: *Weiss Noodle Company v. Golden Cracknel and Specialty Company*, 129 USPQ 411 (CCPA, 1961).

That is to say, while these are all factors in determining the capability of a designation to distinguish goods of a party, the essential and primary consideration is the effect or significance that the term has or would have on the average purchaser of the goods. In making this determination, the nature of the term in relationship to the goods in connection with which it is used as well as the manner in which it is used must be considered. See: *Q-Tips, Inc. v. Johnson & Johnson*, 95 USPQ 264 (DC NJ, 1952), and *Supply Manufacturing Co., Inc. v. King Trimmings, Inc., et al.*, 139 USPQ 163 (DC NY, 1963).

It is clear from the record that applicant is marketing glass ovenware coated with "the new Du Pont TEFLON non-stick finish" under its principal trademark "FIRE-KING". The designation "EASY CLEEN" appears on the label specimens in association not only with the mark "FIRE-KING" but with such wording as "NO STICKING! NO SCOURING!" and "even Burned Foods Will Not Stick! Just Sponge And Rinse Away!" The only promotional material made of record by applicant consists of a stiff board, which is a promotion of "TEFLON Coated Fire-King Ovenware" and a leaflet promoting "FIRE-KING" ovenware. The designation "EASY CLEEN" appears on the stiff board below a pictorial representation of two hands in a sink cleaning a dish and above the words "Du Pont's new TEF-

LON coating makes cleaning ovenware a real joy! No Sticking! No Scouring! Even burnt foods sponge and rinse away!". Applicant's ovenware is advertised in the leaflet as "The amazing easy clean, non-stick way to bake" and "its polished surface is so easy to clean".

[2] There can be no question but that the term "EASY CLEEN" immediately describes a very desirable characteristic of applicant's ovenware; and considering the manner in which the designation appears on the label specimens and in applicant's promotional material, the only significance that it has or would have to purchasers is to indicate that applicant's "TEFLON coated FIRE-KING ovenware is easy to clean". The examiner has made of record a page from the January 1965 edition of "Housewares Review" which contains an advertisement by another party promoting the "easy cleaning" features of its "TEFLON" coated kitchen tools. Moreover, judicial notice may be taken of the fact that a desirable characteristic of any "TEFLON" coated houseware product is the ease in which it can be cleaned.

[3] It would appear from the foregoing that the designation "EASY CLEEN" serves and would continue to serve only to describe the easy cleaning quality of applicant's "TEFLON" coated ovenware; and, in our opinion, it is therefore incapable of distinguishing applicant's goods in trade.

[4] Insofar as the registrations of "EASY CLEEN" or phonetic equivalents thereof referred to by applicant are concerned, they are wholly immaterial to the question of whether or not the term "EASY CLEEN" is capable of distinguishing the particular and distinctly different goods of applicant herein. Each case must necessarily be determined upon its own particular facts and circumstances.

#### Decision

The refusal of registration is affirmed.

LEACH, Member, dissenting.

The term "EASY CLEEN" is clearly descriptive of applicant's ovenware, and I would concur in the majority opinion were applicant here seeking registration thereof on the Principal Register. The question to be determined here, however, is not whether "EASY CLEEN" is merely descriptive, or, as used by applicant, it would in fact identify and distinguish applicant's goods, but whether it is "capable" of

distinguishing the same, which is the only requirement for registration on the Supplemental Register.

As hereinbefore indicated "EASY CLEEN", or variations thereof, has been registered numerous times for a wide variety of products, including clean out traps, nursing bottles, air filter panels, and the like. And, while it is recognized that these third-party registrations are not necessarily controlling on the issue hereof, they are to me persuasive that "EASY CLEEN" does possess the capacity of distinguishing applicant's goods.

I would reverse the examiner.

#### Supreme Court of the United States

BRENNER, Comr. Pats. v. MANSON  
No. 58 Decided Mar. 21, 1966

#### PATENTS

1. Court of Customs and Patent Appeals—In general (§ 28.01)

Supreme Court (§ 64.)

Decision of Court of Customs and Patent Appeals is that of a court established under Article III of Constitution; it is "judicial" in character, and not merely an instruction to Commissioner or part of administrative machinery of Patent Office; it is final and binding in the usual sense; there is no constitutional bar to Supreme Court's jurisdiction to review such a decision: full force and effect is given to 28 U.S.C. 1256, by which Congress intended that certiorari jurisdiction over CCPA cases be as broad as Constitution permits; Court's certiorari jurisdiction is not confined to dissatisfied applicants in patent cases but decisions in applicants' favor may be reviewed on Commissioner's petition for certiorari.

2. Prior adjudication—Applications for patent (§ 56.05)

Prior adjudication — Infringement suits (§ 56.15)

Prior adjudication—R. S. 4915 and R. S. 4918 suits (§ 56.30)

Supreme Court (§ 64.)

CCPA determination that applicant is entitled to patent does not preclude contrary result in subsequent infringement suit, any more than issuance of patent by Patent Office or decision in earlier infringement action against different infringer has that effect; Su-

preme Court reviews decisions of District Court under 35 U.S.C. 145 although these are subject to same measure of readjudication in infringement suits.

3. Pleading and practice in Patent Office—In general (§ 54.1)

Prior adjudication—Applications for patent (§ 56.05)

Issue of patentability of applicant's process cannot be foreclosed by fact that Patent Office has issued third party a patent on same process.

4. Interference—Practice (§ 41.60)

Where applicant presents claim which on its face is unpatentable, an interference is not instituted to determine priority of invention since under Patent Office Rules 201(a) and 203(a) it must first be determined that claimed subject matter is patentable before interference is set up.

5. Patentability — Subject matter for patent monopoly—Process, product and apparatus (§ 51.613)

Patentability—Utility (§ 51.75)

One may patent only that which is useful; chemical process is not useful within meaning of 35 U.S.C. 101 merely because it produces the intended product, for which no use is known, or because compound yielded belongs to a class of compounds which is the subject of serious scientific investigation.

6. Patent grant—Intent of patent laws (§ 50.15)

One purpose of patent system is to encourage dissemination of information concerning discoveries and inventions.

Particular patents—Organic Compounds

Manson, Preparation of Organic Compounds, claims 2 and 3 of application refused.

On writ of certiorari to Court of Customs and Patent Appeals, 142 USPQ 35.

Application for patent of Andrew John Manson, Serial No. 3,693, filed Jan. 20, 1960; Patent Office Mechanical Division A. On writ of certiorari to review judgment reversing decision of Patent Office Board of Appeals rejecting claims 2 and 3. Reversed; Mr. Justice Douglas, concurring in part and dissenting in part without opinion; Mr. Justice Harlan, concurring in part and dissenting in part with opinion. See also 145 USPQ 743.

PAUL BENDER (THURGOOD MARSHALL,



JOHN W. DOUGLAS, SHERMAN L. COHN, and EDWARD BERLIN on the brief) for petitioner.

DEAN LAURENCE (HERBERT I. SHERMAN and JOHN L. WHITE on the brief) all of Washington, D. C., for respondent.

HERBERT P. KENWAY, Boston, Mass., and W. BROWN MORTON, JR., and ELLSWORTH H. MOSHER, both of Washington, D. C., filed brief for the American Patent Law Association, as amicus curiae.

Mr. JUSTICE FORTAS delivered the opinion of the Court.

This case presents two questions of importance to the administration of the patent laws: First, whether this Court has certiorari jurisdiction, upon petition of the Commissioner of Patents, to review decisions of the Court of Customs and Patent Appeals; and, second, whether the practical utility of the compound produced by a chemical process is an essential element in establishing a prima facie case for the patentability of the process. The facts are as follows:

In December 1957, Howard Ringold and George Rosenkranz applied for a patent on an allegedly novel process for making certain known steroids.<sup>1</sup> They claimed priority as of December 17, 1956, the date on which they had filed for a Mexican patent. United States Patent No. 2,908,693 issued late in 1959.

In January 1960, respondent Manson, a chemist engaged in steroid research, filed an application to patent precisely the same process described by Ringold and Rosenkranz. He asserted that it was he who had discovered the process, and that he had done so before December 17, 1956. Accordingly, he requested that an "interference" be declared in order to try out the issue of priority between his claim and that of Ringold and Rosenkranz.<sup>2</sup>

The applicants described the products of their process as "2-methyl dihydrotestosterone derivatives and esters thereof as well as 2-methyl dihydrotestosterone derivatives having a C-17 lower alkyl group. The products of the process of the present invention have a useful high anabolic-androgenic ratio and are especially valuable for treatment of those ailments where an anabolic or antiestrogenic effect together with a lesser androgenic effect is desired."

<sup>1</sup> 35 U. S. C. § 135 (1964 ed.) provides: "Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof . . . . The question of priority of invention shall be determined by a board of patent inter-

A Patent Office examiner denied Manson's application, and the denial was affirmed by the Board of Appeals within the Patent Office. The ground for rejection was the failure "to disclose any utility for" the chemical compound produced by the process. Letter of examiner, dated May 24, 1960. This omission was not cured, in the opinion of the Patent Office, by Manson's reference to an article in the November 1956 issue of the Journal of Organic Chemistry, 21 J. Org. Chem. 1333-1335, which revealed that steroids of a class which included the compound in question were undergoing screening for possible tumor-inhibiting effects in mice, and that a homologue<sup>3</sup> adjacent to Manson's steroid, had proven effective in that role. Said the Board of Appeals, "It is our view that the statutory requirement of usefulness of a product cannot be presumed merely because it happens to be closely related to another compound which is shown to be useful."

The Court of Customs and Patent Appeals (hereinafter CCPA) reversed, *interferences . . . whose decision, if adverse to the claim of an applicant, shall constitute the final refusal by the Patent Office of the claims involved, and the Commissioner may issue a patent to the applicant who is adjudged the prior inventor* . . . .

Patent Office Rule 204(b), 37 CFR § 1.204(b), provides: "When the filing date or effective filing date of an applicant is subsequent to the filing date of a patentee, the applicant, before an interference will be declared, shall file an affidavit that he made the invention in controversy in this country before the filing date of the patentee . . . and, when required, the applicant shall file an affidavit . . . setting forth facts which would prima facie enable him to an award of priority relative to the filing date of the patentee."

Judge Thurman Arnold has provided an irreverent description of the way patent claims, including "interferences," are presented to the Patent Office. See Monsanto Chemical Co. v. Coe, 145 F.2d 18, 62 USPQ 37 (C. A. D. C. Cir.).

<sup>3</sup> A homologous series is a family of chemically related compounds, the composition of which varies from member to member by CH<sub>2</sub> (one atom of carbon and two atoms of hydrogen) . . . . Chemists knowing the properties of one member of a series would in general know what to expect in adjacent members." Application of Henze, 207 CCPA 1009, 1014, 181 F.2d 196, 200-201, 85 USPQ 261, 264. See also In re Hass, 31 CCPA 903, 907, 141 F.2d 122, 125, 60 USPQ 54, 547. Application of Norris, 37 CCPA 876, 179 F.2d 970, 84 USPQ 458. Application of Jones, 32 CCPA 1029, 149 F.2d 501, 65 USPQ 480. With respect to the inferior predictability of steroid homologues, see, *infra*.

Chief Judge Worley, dissenting. 52 CCPA 739, 333 F.2d 234, 237-238, 142 USPQ 36, 37-38. The court held that Manson was entitled to a declaration of interference since "where a claimed process produces a known product it is not necessary to show utility for the product," so long as the product "is not alleged to be detrimental to the public interest." Certiorari was granted, 380 U.S. 971, 145 USPQ 743, to resolve this "utility" dispute over what constitutes "utility" in chemical process claims,<sup>4</sup> as well as to answer the question concerning our certiorari jurisdiction.

# I.

Section 1256 of Title 28 U.S.C. (1964 ed.), enacted in 1948, provides that "Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari." This unqualified language would seem to foreclose any challenge to our jurisdiction in the present case. Both the Government<sup>5</sup> and the respondent urge that we have certiorari jurisdiction over patent decisions of the CCPA, although the latter would confine our jurisdiction to those petitions filed by dissatisfied applicants and would deny the Commissioner of Patents the right to seek certiorari.<sup>6</sup> This concert of

<sup>4</sup> In addition to the clear conflict between the Patent Office and the CCPA, there arguably exists one between the District of Columbia and the CCPA. Limited v. Watson, 101 U.S. App. 214, 247 F.2d 800, 114 USPQ 94, cert. denied, 355 U.S. 955, 116 USPQ 602. But see Application of Ewars, 50 CCPA 1571, 1576-1583, 319 F.2d 277, 282-286, 138 USPQ 208, 211-216.

<sup>5</sup> The present case is the first in which the Government has taken the position that § 1256 confers jurisdiction upon this Court to review patent decisions in the CCPA. Prior to Glidden Co. v. Zdanok, 370 U.S. 530, the Government was of the view that the Court lacked jurisdiction. See, e.g., the Brief in Opposition in Dalton v. Marshall, No. 87, O. T. 1951, cert. denied, 342 U.S. 818, 91 USPQ 382. After the decision in Glidden, discussed *infra*, the Government conceded the issue was a close one. See, e.g., Brief in Opposition in re Gruschwitz, No. 579, O. T. 1963, cert. denied, 375 U.S. 967, 140 USPQ 694.

<sup>6</sup> We find no warrant for this curious limitation either in the statutory language or in the legislative history of § 1256. Nor do we find persuasive the circumstance that the Commissioner may not appeal adverse decisions of the Board of Appeals. 35 U.S.C. §§ 141, 142, and 145 (1964 ed.). As a member of the Board and the official responsible for selecting the membership of its panels, 35 U.S.C. § 7 (1964 ed.), it may be considered appropriate that the Commissioner be bound by Board determinations. No such consideration operates

opinion does not settle the basic question because jurisdiction cannot be conferred by consent of the parties. The doubt that does exist stems from a decision of this Court, rendered in January 1927, in *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, which has been widely interpreted as precluding jurisdiction over patent and trademark decisions of the CCPA.

Postum, however, was based upon a statutory scheme materially different from the present one. Postum involved a proceeding in the Patent Office to cancel a trademark. The Commissioner of Patents rejected the application. An appeal was taken to the then Court of Appeals for the District of Columbia, which in 1927 exercised the jurisdiction later transferred to the CCPA. Under the statutory arrangements in effect at the time, the judgment of the Court of Appeals was not definitive because it was not an order to the Patent Office determining of the controversy. A subsequent bill in equity could be brought in the District Court and it was possible that a conflicting adjudication could thus be obtained. On this basis, the Court held that it could not review the decision of the Court of Appeals. It held that the conclusion of the Court of Appeals was an "administrative decision" rather than a "judicial judgment"; "merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes." 272 U.S., at 698-699. Therefore, this Court concluded, the proceeding in the Court of Appeals—essentially administrative in nature—was neither case nor controversy within the meaning of Article III of the Constitution. Congress might confer such "administrative" tasks upon the courts of the District of Columbia, wrote Chief Justice Taft, but it could not empower this Court to participate therein.

Congress soon amended the statutory scheme. In March of 1927 it provided that an action in the District Court was to be alternative and not cumulative to appellate review, that it could not be maintained to overcome an adjudication in the Court of Appeals.<sup>7</sup> In order to prevent his seeking review of adverse decisions rendered by the CCPA.

<sup>7</sup> Act of March 2, 1927, c. 273, § 11, 44 Stat. 1335, 1336. See *Glidden Co. v. Zdanok*, supra, at 572-579; Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals, 18 Geo. Wash. L. Rev. 192 (1950). This remains the law. 35 U.S.C. §§ 141, 145.



1929 Congress transferred appellate jurisdiction over the Commissioner's decisions from the Court of Appeals to what had been the Court of Customs Appeals and was now styled the Court of Customs and Patent Appeals.<sup>9</sup> Whereas the Court of Appeals had been empowered to take additional evidence and to substitute its judgment for that of the Commissioner, the CCPA was confined to the record made in the Patent Office.<sup>10</sup> Compare *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 144-145. Despite these changes, however, Postum had acquired a life of its own. It continued to stand in the way of attempts to secure review here of CCPA decisions respecting the Commissioner of Patents. See, e.g., *McBride v. Teeple*, 311 U.S. 649, 47 USPQ 531, denying certiorari for "want of jurisdiction" on the authority of *Postum*.<sup>10</sup>

This was the background against which Congress, in its 1948 codification of statutes pertaining to the judiciary, enacted § 1256, blandly providing in unqualified language for review on certiorari of "cases in the Court of Customs and Patent Appeals." Nothing in the legislative materials relating to the statute, except its language, is of assistance to us in the resolution of the present problem: Did the statutory changes which followed *Postum* mean that a patent decision by the CCPA was a "judicial" determination reviewable by this Court under Article III? And, if so, was § 1256 intended to create such jurisdiction?

Assistance came with the 1958 revision of the Judicial Code. Congress there declared the CCPA "a court established under article III \* \* \*" that is, a constitutional court exercising judicial rather than administrative power. 28 U.S.C. § 211 (1964 ed.). In 1962 this Court addressed itself to the nature and status of the CCPA. *Gladstein Co. v. Zdanok*, 370 U.S. 530. It raised the question whether a judge of the CCPA was an Article III judge, capable of exercising federal judicial power. In answering that question in the affirmative, Mr. Justice Harlan's opinion, for three of the seven Justices participating, expressly left open the

<sup>9</sup> Act of March 2, 1929, c. 488, 4 Stat. 1475.

<sup>10</sup> See *Kurland and Wolfson*, op. cit. supra, n. 7, at 196.

<sup>11</sup> Apart from *Postum*, until enactment of § 1256 in 1948 there existed no statutory basis for jurisdiction in these cases. See *Robertson and Kirkham*. Jurisdiction of the Supreme Court of the United States, § 251 (*Wolfson and Kurland* ed. 1951).

question whether § 1256 conferred certiorari jurisdiction over patent and trademark cases decided in the CCPA, 379 U.S., at 578 n. 49. It suggested, however, that *Postum* might be nothing more than a museum piece. The opinion noted that *Postum* "must be taken to be limited to the statutory scheme in existence before" 1929. 370 U.S., at 579. The concurring opinion of Mr. Justice Clark, in which the Chief Justice joined, did not reflect any difference on this point.

[¶] Thus, the decision sought to be reviewed is that of an Article III court. It is "judicial" in character. It is not merely an instruction to the Commissioner or part of the "administrative machinery" of the Patent Office. It is final and binding in the usual sense.<sup>11</sup> In sum, *Postum* has no vitality in the present setting, and there remains no constitutional bar to our jurisdiction.

Having arrived at this conclusion, we have no difficulty in giving full force and effect to the generality of the language in § 1256. It would be entirely arbitrary for us to assume, despite the statutory language, that Congress in 1948 intended to enshrine *Postum*—descheme fundamentally altered in 1927 and 1929—into a hidden exception to the sweep of § 1256. The contrary is more plausible: that by using broad and unqualified language, Congress intended our certiorari jurisdiction over CCPA cases to be as broad as the Constitution permits.

This conclusion is reinforced by reference to the anomalous consequences which would result were we to adopt a contrary view of § 1256. Determinations of the Patent Office may be challenged either by appeal to the CCPA or by suit instituted in the United States District Court for the District of Columbia. 35 U.S.C. § 145, 28 U.S.C. § 1342 (1964 ed.). Where the latter route is elected, the decision obtained may be reviewed in the Court of Appeals for the District of Columbia Cir-

[¶] This is not to say that a CCPA determination that an applicant is entitled to a patent precludes a contrary result in a subsequent infringement suit. Any more than issuance of a patent by the Patent Office or the decision in an earlier infringement action against a different "infringer" has that effect. See, e.g., *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 439. We review decisions of the District Court under 35 U.S.C. § 145 although these are subject to the same measure of readjudication in infringement suits. See *Hoover Co. v. Coe*, 325 U.S. 79, 65 USPQ 180.

cuit, and ultimately in this Court upon writ of certiorari. *Hoover Co. v. Coe*, 325 U.S. 79, 65 USPQ 180. It would be strange indeed if corresponding certiorari jurisdiction did not exist where that so, in the event of conflict between the CCPA and the courts of the District of Columbia, resolution by this Court would be achievable only if the litigants chose to proceed through the latter. Obviously, the orderly administration both of our certiorari jurisdiction and of the patent laws requires that ultimate review be available in this Court, regardless of the route chosen by the litigants.

We therefore conclude that § 1256 authorizes the grant of certiorari in the present case. We now turn to the merits.<sup>12</sup>

<sup>12</sup> Respondent and the amicus curiae take a different view than does the Government of precisely what the issue on the merits is. They argue that the issue of "patentability" is not properly before us, that the issue actually presented is whether the Primary Examiner in the Patent Office has authority under Rule 204 (b) himself to evaluate the sufficiency of affidavits submitted under that Rule.

[¶] Both the Board of Appeals and the CCPA reflected this view and focused instead on the question of what averments satisfy the statutory requirement that a claimed chemical process be "useful." We agree. First, the issue of "patentability" cannot be foreclosed by the circumstance that the Patent Office—which, according to counsel for respondent, processes some 1,800 claims and issues 700 patents each week—has already issued a patent to Ringold and Rosenkranz who asserted in their claim that their process yielded useful products. See note 1, supra.

[¶] Second, there is no basis for the proposition that even where an applicant for an interference presents a claim which on its face is unpatentable, a complicated and frequently lengthy factual inquiry into priority of invention must inexorably take place. On the contrary, Rule 201(a), 37 CFR § 1.201(a), defines an interference proceeding as one involving "two or more parties claiming substantially the same patentable invention and may be instituted as soon as it is determined that common patentable subject matter is claimed \* \* \*." (Emphasis supplied.) See Application of Rogoff, 46 CCPA 733, 739, 261 F.2d 601, 606, 120 USPQ 185, 188: "The question as to patentability of claims to an applicant must be determined before any question of interference arises and claims otherwise unpatentable to an applicant cannot be allowed merely in order to set up an interference." See also *Winkler v. Perkins*, 44 CCPA 1005, 1008, 245 F.2d 502, 504, 114 USPQ 284, 286. Cf. *Gladstein v. De Roo*, 44 CCPA 723, 239 F.2d 402, 112 USPQ 62.

The current version of Rule 203(a), 37

## II.

[¶] Our starting point is the proposition, neither disputed nor disputable, that one may patent only that which is "useful." In *Graham v. John Deere Co.*, 382 U.S.—, 148 USPQ 459, we have reviewed the history of the requisites of patentability, and it need not be repeated here. Suffice it to say that the concept of utility has maintained a central place in all of our patent legislation, beginning with the first patent law in 1790 and culminating in the present law's provision that

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."<sup>14</sup>

As is so often the case, however, a simple, everyday word can be pregnant with ambiguity when applied to the facts of life. That this is so is demonstrated by the present conflict between the Patent Office and the CCPA over how the test is to be applied to a chemical process which yields an already known product whose utility—other than as a possible object of scientific inquiry—has not yet been evidenced. It was not long ago that agency and court seemed of one mind on the question. In application of *Brenner*, 37 CCPA 1032, 1034, 182 F.2d 216, 217, 86 USPQ 74, 75, the court affirmed rejection by the Patent Office of both process and product claims. It noted that "no use for the products claimed to be developed by the processes had been shown in the specification." It held that "it was never intended that a patent be granted upon a product, or a process producing a product, unless such product be useful." Nor was this new doctrine in the court. See *Thomas v. Michael*, 35 CCPA 1036, 1038-1039, 166 F.2d 944, 946-947, 77 USPQ 216, 217-218.

The Patent Office has remained steadfast in this view. The CCPA, however, has moved sharply away from *Brenner*. The trend began in Application of Nelson, 47 CCPA 1031, 280 F.2d 172, 126 CFR § 1.203(a), makes it explicit that the examiner "before the declaration of an interference" must determine the patentability of the claim as to each party. See also Rule 237, 37 CFR § 1.237. <sup>13</sup> See Act of April 10, 1790, c. 7, 1 Stat. 109; Act of Feb. 21, 1793, c. 11, 1 Stat. 318; Act of July 4, 1836, c. 357, 5 Stat. 117; Act of July 8, 1870, c. 230, 16 Stat. 198; Rev. Stat. (1874) § 4886. <sup>14</sup> 35 U.S.C. § 101 (1964 ed.).



USPQ 242. There, the court reversed the Patent Office's rejection of a claim on a process yielding chemical intermediates "useful to chemists doing research on steroids," despite the absence of evidence that any of the steroids thus ultimately produced were themselves "useful." The trend has accelerated,<sup>15</sup> culminating in the present case where the court held it sufficient that a process produces the result intended and is not "detrimental to the public interest." 52 CCPA, at —, 333 F.2d, at 238, 142 USPQ at 38.

It is not remarkable that differences arise as to how the test of usefulness is to be applied to chemical processes. Even if we knew precisely what Congress meant in 1790 when it devised the "new and useful" phraseology and in subsequent re-enactments of the test, we should have difficulty in applying it in the context of contemporary chemistry where research is as comprehensive as man's grasp and where little or nothing is wholly beyond the pale of "utility"—if that word is given its broadest reach.

Respondent does not—at least, in the first instance—rest upon the extreme proposition, advanced by the court below, that a novel chemical process is patentable so long as it yields the intended product<sup>16</sup> and so long as the product is not itself "detrimental." Nor does he commit the outcome of his claim to the slightly more conventional proposition that any process is "useful" within the meaning of § 101 if it produces a compound whose potential usefulness is under investigation by serious scientific researchers, although he urges this position, too, as an alter-

<sup>15</sup> Thus, in Application of Wilke, 50 CCPA 964, 314 F.2d 558, 136 USPQ 435, the court reversed a Patent Office denial of a process claim, holding that 35 U.S.C. § 112 (1964) ed.) was satisfied even though the specification recited only the manner in which the process was to be used and not any use for the products thereby yielded. See also Application of Adams, 50 CCPA 1185, 316 F.2d 476, 137 USPQ 333. In Application of Szwarc, 50 CCPA 1571, 319 F.2d 277, 138 USPQ 208, the court acknowledged that its view of the law respecting utility of chemical processes had changed since Brenner. See generally, Note, The Utility Requirement in the Patent Law, 53 Geo. L. J. 154, 175-181 (1964).

<sup>16</sup> Respondent couches the issue in terms of whether the process yields a "known" product. We fail to see the relevance of the fact that the product is "known," save to the extent that references to a compound in scientific literature suggest that it might be a subject of interest and possible investigation.

native basis for affirming the decision of the CCPA. Rather, he begins with the much more orthodox argument that his process has a specific utility which would entitle him to a declaration of interference even under the Patent Office's reading of § 101. The claim is that the supporting affidavits filed pursuant to Rule 204(b), by reference to Ringold's 1956 article, reveal that an adjacent homologue of the steroid yielded by his process has been demonstrated to have tumor-inhibiting effects in mice, and that this discloses the requisite utility. We do not accept any of these theories as an adequate basis for overriding the determination of the Patent Office that the "utility" requirement has not been met.

Even on the assumption that the process would be patentable were respondent to show that the steroid produced had a tumor-inhibiting effect in mice,<sup>17</sup> we would not overrule the Patent Office finding that respondent has not made such a showing. The Patent Office held that, despite the reference to the adjacent homologue, respondent's papers did not disclose a sufficient likelihood that the steroid yielded by his process would have similar tumor-inhibiting characteristics. Indeed, respondent himself recognized that the presumption that adjacent homologues have the same utility<sup>18</sup> has been challenged in the steroid field because of "a greater known unpredictability of compounds in that field."<sup>19</sup> In these circumstances and in this technical area, we would not overturn the finding of the Primary Examiner, affirmed by the Board of Appeals and not challenged by the CCPA.

<sup>17</sup> In light of our disposition of the case, we express no view as to the patentability of a process whose sole demonstrated utility is to yield a product shown to inhibit the growth of tumors in laboratory animals. See Application of Hitchings, 52 CCPA 1141, 342 F.2d 80, 144 USPQ 637; Application of Bergel, 48 CCPA 1102, 292 F.2d 955, 130 USPQ 208; cf. Application of Dodson, 48 CCPA 1125, 292 F.2d 943, 130 USPQ 224; Application of Krimmel, 48 CCPA 1116, 292 F.2d 948, 130 USPQ 215. For a Patent Office view, see Marcus, The Patent Office and Pharmaceutical Invention, 47 J. P. O. S. 669, 673-676 (1965).

<sup>18</sup> See n. 3, supra.  
<sup>19</sup> See respondent's letter requesting amendment, dated July 21, 1960, Record, pp. 20-23. See also Application of Adams, 50 CCPA 1185, 1190, 316 F.2d 476, 479-480, 137 USPQ 333, 335-336 (dissenting opinion). In the present case, the Board of Appeals found support in the Ringold article itself for the view that "minor changes in the structure of a steroid may produce profound changes in its biological activity." Record, p. 52.

The second and third points of respondent's argument present issues of much importance. Is a chemical process "useful" within the meaning of § 101 either (1) because it works—i.e., produces the intended product? or (2) because the compound yielded belongs to a class of compounds now the subject of serious scientific investigation? These contentions present the basic problem for our adjudication. Since we find no materials underlying § 101, we are relegated to an analysis of the problem in light of the general intent of Congress, the purposes of the patent system, and the implications of a decision one way or the other.

In support of his plea that we attenuate the requirement of "utility," respondent relies upon Justice Story's well-known statement that a "useful" invention is one "which may be applied to a beneficial use in society, in contradistinction to an invention injurious to the morals, health, or good order of society, or frivolous and insignificant."<sup>20</sup>—and upon the assertion that to do so would encourage inventors of new processes to publicize the event for the benefit of the entire scientific community, thus widening the search for uses and increasing the fund of scientific knowledge. Justice Story's language sheds little light on our subject. Narrowly read, it does no more than compel us to decide whether the invention in question is "frivolous and insignificant"—a query no easier of application than the one built into the statute. Read more broadly, so as to allow the patenting of any invention not positively harmful to society, it places such a special meaning on the word "useful" that we cannot accept it in the absence of evidence that Congress so intended. There are, after all, many things in this world which may not be considered "useful" but which, nevertheless, are totally without a capacity for harm.

[6] It is true, of course, that one of the purposes of the patent system is to encourage dissemination of information concerning discoveries and inventions.<sup>21</sup>

<sup>20</sup> Appendix, Note on the Patent Laws, 3 Wheat. 13, 24. See also Justice Story's decisions on circuit in *Lowell v. Lewis*, 15 Fed. Cas. 1018 (No. 8568) (C. C. D. Mass.), and *Bedford v. Hunt*, 3 Fed. Cas. 37 (No. 1217) (C. C. D. Mass.).

<sup>21</sup> "As a reward for inventions and to encourage their disclosure, the United States offers a seventeen-year monopoly to an inventor who refrains from keeping his invention a trade secret." Universal Oil Prods. Co. v. Globe Oil & Ref. Co., 322 U.S. 471, 484, 61 USPQ 382, 388

And it may be that inability to patent a process to some extent discourages disclosure and leads to greater secrecy than would otherwise be the case. The inventor of the process, or the corporate organization by which he is employed, has some incentive to keep the invention secret while uses for the product are searched out. However, in light of the highly developed art of drafting patent claims so that they disclose as little useful information as possible—while broadening the scope of the claim as widely as possible—the argument based upon the virtue of disclosure must be warily evaluated. Moreover, the pressure for secrecy is easily exaggerated, for if the inventor of a process cannot himself ascertain a "use" for that which his process yields, he has every incentive to make his invention known to those able to do so. Finally, how likely is disclosure of a patented process to spur research by others into the uses to which the product may be put? To the extent that the patentee has power to enforce his patent, there is little incentive for others to undertake a search for uses.

Whatever weight is attached to the value of encouraging disclosure and of inhibiting secrecy, we believe a more compelling consideration is that a process patent in the chemical field, which has not been developed and pointed to the degree of specific utility, creates a monopoly of knowledge which should be granted only if clearly commanded by the statute. Until the process claim has been reduced to production of a product shown to be useful, the metes and bounds of that monopoly are not capable of precise delineation. It may engross a vast, unknown, and perhaps unknowable area. Such a patent may confer power to block off whole areas of scientific development,<sup>22</sup> without compensating benefit to the public. The basic quid pro quo contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility. Unless and until a process is refined and developed to this point—where specific benefit exists in currently available form—there is insufficient justification for permitting an applicant to engross what may prove to be a broad field.

These arguments for and against the patentability of a process which either has no known use or is useful only in the sense that it may be an object of scientific research would apply equally

<sup>22</sup> See *Monsanto Chemical Co. v. Coe*, 145 F.2d 18, 21-24, 63 USPQ 37, 43-44 (C.A. D.C. Cir.).



to the patenting of the product produced by the process. Respondent appears to concede that with respect to a product, as opposed to a process, Congress has struck the balance on the side of nonpatentability unless "utility" is shown. Indeed, the decisions of the CCPA are in accord with the view that a product may not be patented absent a showing of utility greater than any ad- absolutely no warrant case.<sup>23</sup> We find that although Congress intended that no patent be granted on a chemical compound whose sole "utility" consists of its potential role as an object of use-testing, a different set of rules was meant to apply to the process which yielded the unpatentable product.<sup>24</sup> That proposition seems to us little more than an attempt to evade the impact of the rules which concededly govern patentability of the product itself.

This is not to say that we mean to disparage the importance of contributions to the fund of scientific information short of the invention of something "useful," or that we are blind to the prospect that what now seems without "use" may tomorrow command the grateful attention of the public. But a patent is not a hunting license. It is not a reward for the search, but compensation for its successful conclusion. "[A] patent system must be related to the world of commerce rather than to the realm of philosophy." \* \* \*

The judgment of the CCPA is reversed.

MR. JUSTICE DOUGLAS, while acquiescing in Part I of the Court's opinion, dissents on the merits of the controversy for substantially the reasons stated by MR. JUSTICE HARLAN.

<sup>23</sup> See, e.g., the decision below, 52 CCPA at —, 333 F.2d at 237, 142 USPQ at 3738. See also Application of Bergel, 48 CCPA at 1105, 292 F.2d at 958, 130 USPQ at 206. Cf. Application of Nelson, 47 CCPA at 1043, 1044, 280 F.2d at 180-181, 126 USPQ at 248-251. Application of Folkers, 52 CCPA 1269, 344 F.2d 970, 145 USPQ 390.

<sup>24</sup> The committee reports which preceded enactment of the 1952 revision of the patent laws disclose no intention to create such a dichotomy, and in fact provide some evidence that the contrary was assumed. Sen. Rep. No. 1979, Committee on the Judiciary, 82d Cong., 2d Sess., 5, 17; H. R. Rep. No. 1923, Committee of the Judiciary, 82d Cong., 2d Sess., 6, 17. Cf. Hoxie, A Patent Attorney's View, 47 J. P. O. S. 630, 636 (1965).

<sup>25</sup> Application of Ruschig, 52 CCPA 1238, 343 F.2d 965, 970, 145 USPQ 274, (Rich, J.). See also, Katz v. Horn Signal Mfg. Corp., 145 F.2d 961, 63 USPQ 190 (CA. 2d Cir.).

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

While I join the Court's opinion on the issue of certiorari jurisdiction, I cannot agree with its resolution of the important question of patentability.

Respondent has contended that a workable chemical process, which is both new and sufficiently nonobvious to satisfy the patent statute, is by its existence alone a contribution to chemistry and "useful" as the statute employs that term.<sup>1</sup> Certainly this reading of "useful" in the statute is within the scope of the constitutional grant, which states only that "[t]o promote the Progress of Science and useful Arts," the exclusive right to "Writings and Discoveries" may be secured for limited times to those who produce them. Art. I, § 8. Yet the patent statute is somewhat differently worded and is on its face open both to respondent's construction and to the contrary reading given it by the Court. In the absence of legislative history on this issue, we are thrown back on policy and practice. Because I believe that the Court's policy arguments are not convincing and that past practice favors the respondent, I would reject the narrow definition of "useful" and uphold the judgment of the Court of Customs and Patent Appeals (hereafter CCPA).

The Court's opinion sets out about half a dozen reasons in support of its interpretation. Several of these arguments seem to me to have almost no force. For instance, it is suggested that "[u]ntil the process claim has been reduced to production of a product shown to be useful, the metes and bounds of that monopoly are not capable of precise delineation" and "[i]t may engross a vast, unknown, and perhaps unknowable area." I fail to see the relevance of these assertions; process claims are not disallowed because the products they produce may be of "vast" importance nor, in any event, does advance knowledge of a specific product use provide much safeguard on this score or fix "metes and bounds" precisely since a hundred more uses may be found after a patent is granted and greatly enhance its value.

The further argument that an established product use is part of "[t]he basic quid pro quo" for the patent or is the inventor's search appears to beg the very question whether the process is "useful" simply because it facilitates further research into possible product uses. The same infirmity seems to in-

<sup>1</sup> The statute in pertinent part is set out in the Court's opinion.

here in the Court's argument that chemical products lacking immediate utility cannot be distinguished for prescriptive purposes from the processes which create them, that respondent appears to concede and the CCPA holds that the products are nonpatentable, and that therefore the processes are nonpatentable. Assuming that the two classes cannot be distinguished, a point not adequately considered in the briefs, and assuming further that the CCPA has firmly held such products nonpatentable, this permits us to conclude only that the CCPA is wrong either as to the products or as to the processes and affords no basis for deciding whether both or neither should be patentable absent a specific product use.

More to the point, I think, are the Court's remaining, prudential arguments against patentability: namely, that disclosure induced by allowing a patent is partly undercut by patent-application drafting techniques, that disclosure may occur without granting a patent, and that a patent will discourage others from inventing uses for the product. How far opaque drafting may lessen the public benefits resulting from the issuance of a patent is not shown by any evidence in this case but, more important, the argument operates against all patents and gives no reason for singling out the class involved here. The thought that these inventions may be more likely than most to be disclosed even if patents are not allowed may have more force; but while empirical study of the industry might reveal that chemical researchers would behave in this fashion, the abstractly logical choice for them seems to me to maintain secrecy until a product use can be discovered. As to discouraging the search by others for product uses, there is no doubt this risk exists but the price paid for any patent is that research on other uses or improvements may be hampered because the original patentee will reap much of the reward. From the standpoint of the public interest the Constitution seems to have resolved that choice in favor of patentability.

What I find most troubling about <sup>2</sup> Any concession by respondent would hardly be controlling on an issue of this general importance, but I am less clear than the Court that such a concession exists. See, e.g., Brief for Respondent, p. 53. As to the CCPA, it is quite true that court purports in the very case under review and in others to distinguish product patents, although its actual practice may be somewhat less firm. See Application of Adams, 50 CCPA 1185, 316 F.2d 476, 137 USPQ 333. Application of Nelson, 47 CCPA 1031, 280 F.2d 172, 126 USPQ 242.

the result reached by the Court is the impact it may have on chemical research. Chemistry is a highly interrelated field and a tangible benefit for society may be the outcome of a number of different discoveries, one discovery building upon the next. To encourage one chemist or research facility to invent and disseminate new processes and products may be vital to progress, although the product or process be without "utility," as the Court defines the term, because that discovery permits someone else to take a further but perhaps less difficult step leading to a commercially useful item. In my view, our awareness in this age of the importance of achieving and publicizing basic research should lead this Court to resolve uncertainties in its favor and uphold the respondent's position in this case.

This position is strengthened, I think, by what appears to have been the practice of the Patent Office during most of this century. While available proof is not conclusive, the commentators seem to be in agreement that until Application of Brenner, 37 CCPA 1032, 182 F.2d 216, 86 USPQ 74, in 1960, chemical patent applications were commonly granted although no resulting end use was stated or the statement was in extremely broad terms.<sup>3</sup> Taking this to be true, Brenner represented a deviation from established practice which the CCPA has now sought to remedy in part only to find that the Patent Office does not want to return to the beaten track. If usefulness was typically regarded as inherent during a long and prolific period of chemical research and development in this country, surely this is added reason why the Court's result should not be adopted

<sup>3</sup> See, e.g., the statement of a Patent Office Examiner-in-Chief: "Until recently it was also rather common to get patents on chemical compounds in cases where no use was indicated for the claimed compounds or in which a very broad indication or suggestion as to use was included in the application. [Brenner and another later ruling] . . . have put an end to this practice." Wolffe, Adequacy of Disclosure as Regards Specific Embodiment and Use of Invention, XLI J. P. O. S. 61, 66 (1959). The Government's brief in this case is in accord: "[I]t was apparently assumed by the Patent Office (prior to 1950) . . . that chemical compounds were necessarily useful . . . and that specific inquiry beyond the success of the process was therefore unnecessary . . . ." Brief for the United States, p. 25. See also Cohen & Schwartz, Do Chemical Intermediates Have Patentable Utility? 29 Geo. L. J. 154, 183 (1964); 14 Am. U. L. Rev. 78 (1964).



until Congress expressly mandates it, presumably on the basis of empirical data which this Court does not possess. Fully recognizing that there is ample room for disagreement on this problem when, as here, it is reviewed in the abstract, I believe the decision below should be affirmed.

### Court of Appeals, Seventh Circuit

WAHL et al. v. CARRIER MANUFACTURING Co., Inc.

No. 15252 Decided Mar. 9, 1966

### PATENTS

#### 1. Courts of Appeals—Weight given findings of District Court—Validity and infringement (§ 29.359)

Patent infringement action turns on ultimate technical facts the determination of which requires resolution of conflicting expert testimony; court's recognition of difficulties inherent in arriving at findings in technical area does not remove findings from scope of FRCP 52(a); Rule applies insofar as detailed findings, upon which court predicates conclusions of validity and infringement, concern factual issues such as use made of prior art, nature of improvement over prior art, and characteristics and operational functions of patented structure and accused apparatus; if findings are not clearly erroneous, only question is whether court applied correct legal criteria in reaching ultimate conclusions.

#### 2. Patentability—Aggregation or combination—New or better result (§ 51.157)

Patentability—Evidence of — Delay and failure of others to produce invention (§ 51.459)

Claims are valid where they cover a new and useful combination of elements providing a new and unexpected result, performing a function not previously performed, and filling a long existing need.

#### 3. Infringement—In general (§ 39.01)

Infringer cannot escape natural physical result of action of its machine by disclaiming intent to accomplish it.

#### 4. Infringement—Identity of function or operation (§ 39.50)

Device infringes where it includes every element of patent claims and uses same principle of operation to produce

identical results in same manner as disclosed by patent.

Particular patents—Powder-Feeding 2,800,252, Wahl, Powder-Feeding Apparatus, claims 14, 15, and 17 valid and infringed.

Appeal from District Court for Southern District of Indiana, Stecker, J.

Action by Eugene A. Wahl and Vibra Screw Feeders Inc. against Carrier Manufacturing Co., Inc., for patent infringement. From judgment for plaintiffs, defendant appeals. Affirmed.

THOMAS F. MCWILLIAMS, Chicago, Ill., for appellant.

RICHARD C. O'CONNOR, New Albany, Ind., and STANTON T. LAWRENCE, Jr., New York, N.Y., for appellees.

Before HASTINGS, Chief Judge, and KNOCH and CASTLE, Circuit Judges.

CASTLE, Circuit Judge.

Carrier Manufacturing Co., Inc., defendant-appellant, prosecutes this appeal from the judgment order of the District Court entered against it in an action brought by Eugene A. Wahl and Vibra Screw Feeders, Inc., plaintiffs-appellees, charging Carrier with infringement of U.S. Patent No. 2,800,252, entitled Powder-Feeding Apparatus. Carrier asserted invalidity of the patent and denied infringement. Following trial of the issues the court made and entered detailed findings of fact and conclusions of law. The court held claims 14, 15 and 17 of the patent valid and infringed by Carrier's device designated as plaintiffs' Exhibit p-11.

The subject matter of the patent in suit is a powder-feeding apparatus capable of discharging powdered and granular materials into a medium or container at a predetermined volumetric rate. The patented structure embraces, among other things, a storage hopper from which the material is fed to a dispensing tube housing an auger rotated at a predetermined and constant speed. The tube and the auger are simultaneously vibrated by suitable means, the vibration being deliberate and controlled imparting to the material being conveyed in the tube a constant density which enables the spaces between the flights of the screw to act as a continuous succession of measuring chambers metering the material, and causing it to be discharged from the open end of the tube at a predetermined volumetric rate.

1 Wahl and the corporate plaintiff are, respectively, the owner and the exclusive licensee of the patent.

The constant volumetric rate results in a constant weight rate, and the record discloses that accuracy of feed by weight, such as pounds per minute or tons per hour, is important in many industrial applications. The controlled vibration of the auger, which supplies the factor of constant density to the materials being measured and dispensed, permits the achievement of such operating accuracy as enables the apparatus to be successfully used for the measured feeding of such hard-to-handle materials as carbon black, including channel black, a light fluffy powder used in the process of manufacturing photograph records; dry filter cel used in commercial filtration processes and previously required to be slurried to obtain accurately measured feeding; and to meter sticky amorphous powders used in the chemical industries. Previous volumetric feeders were incapable of accurately measuring the dispensing of these and other hard-to-handle powdery or granular materials. It is not disputed that the plaintiffs' commercial structure, which embodies the elements of claims 14, 15 and 17, has enjoyed commercial success.

Claim 14 is typical of the three claims found to be valid, and to be infringed by Carrier's accused apparatus. It reads as follows:

Claim 14. Apparatus for dispensing granular material or the like at a predetermined rate, comprising a member having a material-receiving portion and a material-discharge portion, an auger disposed in said member, means for rotating the auger about its axis to advance the material from the said receiving portion to said discharge portion, and separate power means for deliberately and controllably vibrating the auger during its rotation.

The main thrust of Carrier's contentions on appeal is that prior art references either establish such anticipation of Claims 14, 15 and 17 of the patent in suit as invalidates them or require a construction of the claim language which calls for "deliberately and controllably vibrating the auger during its rotation" in a manner which precludes

2 Claim 15 differs from Claim 14 principally by adding a hopper with a discharge opening for feeding the material to the material-receiving portion; Claim 17 defines the material receiving and discharging member as a tube having an intake opening at one end and a discharge opening at the other end, with the auger rotating about its axis at a constant speed within the tube.

a finding of infringement of the claims by Carrier's accused device. Carrier also contends the District Court's factual findings are deprived of the usual finality imposed by Rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C.A.) because of remarks by the court following the post-trial arguments, to the effect that the case was not an easy one to decide, and in which the court identified the technical area presenting difficulty and causing it concern.

The plaintiffs urge that substantial evidence supports the court's factual findings, and that the court's frank recognition that the tasks of resolving conflicting expert testimony, marshalling the pertinent facts, and analyzing the prior art, presented difficulty does not serve to detract from but actually emphasizes the applicability of Rule 52(a).

[1] We agree with plaintiffs that like many patent infringement actions this one turns on ultimate technical facts the determination of which requires resolution of conflicts in the testimony of experts, and that the court's recognition of the difficulties inherent in arriving at findings in this technical area did not remove those findings, when made, from the scope of Rule 52 (a).

Therefore, insofar as the detailed findings of the court, upon which it predicates its conclusions of validity and infringement, concern factual issues such as the use made of prior art, the nature of the improvement made over prior art, and the characteristics and operational functions of the patented structure and the accused apparatus, Rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C.A.) applies. The court heard the testimony of expert witnesses in connection with these matters and witnessed the demonstration of the physical exhibits, including the operation of the accused apparatus. The scope of our review of such findings is therefore limited to a determination of whether or not they are "clearly erroneous". *Armour & Co. v. Wilson & Co.*, 7 Cir., 274 F.2d 143, 151-157, 124 USPQ 115, 121-126; *Minnesota Mining and Mfg. Co. v. Technical Tape Corp.*, 7 Cir., 309 F.2d 55, 57, 135 USPQ 176, 178-179; *Aerosol Research Company v. Scovill Manufacturing Co.*, 7 Cir., 334 F.2d 751, 753, 141 USPQ 758, 760. If they find support in the evidence we are bound thereby and there remains but the question of whether the court applied the correct legal criteria in reaching the ultimate conclusions it did.

The District Court found, on the basis of the documentary evidence furnished by the patents themselves and